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No. 207

In the Supreme Court of the United States

October Term, 1968

Mary V. Bond, Clerk of the Court of Appeals of the State of Georgia, et al., Appellants,

v.

Julian Bond, etc.

On Appeal from the United States District Court for the District of Delaware

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY, ET AL., APPELLANTS

v.

RICHARD SINCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (R. 491–531) is reported at 215 F. Supp. 169. Prior opinions of the district court (R. 66–76, 214–217, 319–332) are reported at 207 F. Supp. 205 and 210 F. Supp. 395 and 396.

JURISDICTION

The judgment of the district court was entered on April 17, 1963 (R. 532–533). Notices of appeal to this Court were filed on May 28 and June 12, 1963, and probable jurisdiction was noted on October 21, 1963 (R. 541–545, 551–554). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the provisions of the Delaware Constitution apportioning the Delaware legislature, which create serious disparities in per capita representation in both houses without any permissible or even rational justification and give control of the legislature to a small minority of the people, violate the equal protection clause of the Fourteenth Amendment.

2. Whether the decree of the district court enjoining further elections pursuant to the unconstitutional apportionment was an abuse of discretion.

INTEREST OF THE UNITED STATES

This is one of five reapportionment cases pending disposition in which the Court is called upon to formulate under the Fourteenth Amendment constitutional principles applicable to challenges to malapportionment of a State legislature. The Court has heard argument in the New York, Alabama, Maryland, and Virginia cases. The United States has filed its principal brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, in which we attempted to present a compendious analysis of principles which we deem applicable in the reapportionment field. The instant case raises specific problems in the application of those principles.

STATEMENT

1. *The Complaint.*—On June 5, 1962, the plaintiffs—seven citizens and taxpayers of the United States and the State of Delaware, who are residents and qualified voters of New Castle County, Delaware—filed a complaint in the United States District

Court for the District of Delaware, in their own behalf and on behalf of all persons similarly situated, challenging the apportionment of the Delaware legislature (R. 1–28). The defendants, who were sued in their representative capacities as officials charged with the performance of duties in connection with State elections, included the State Election Commissioner, the members of the Department of Election for each of the State's three counties, the members of the Board of Canvass of the three counties, and three Clerks of Peace (R. 5–7). The complaint alleged deprivation of rights under the equal protection clause of the Fourteenth Amendment, and asserted that the district court had jurisdiction under the Fourteenth Amendment, 42 U.S.C. 1983 and 1988, and 28 U.S.C. 1343 and 2201 (R. 3).

The complaint alleged that the apportionment of the Delaware legislature resulted in "invidious discrimination as to the inhabitants of New Castle County and the City of Wilmington" (R. 10–14). It alleged that the plaintiffs had the right "to cast votes [for legislators] that are of equal effect with that of every other citizen of the State of Delaware"; that the malapportionment of the legislature has operated to deny those rights to the plaintiffs; and that such malapportionment constituted "arbitrary and capricious state action which denies to petitioners a full vote in equality with other voters of the State of Delaware by reason of the failure to provide a reasonable classification of voters and members of the General Assembly," in violation of, *inter alia,* the equal

protection and due process clauses of the Fourteenth Amendment (R. 14–15).

Plaintiffs also alleged that they were without any other adequate remedy inasmuch as the legislative apportionment was "frozen" into the State constitution; that the legislature was dominated by representatives from the less populous counties; and that it was impossible to amend the constitution or to convene a constitutional convention for the purpose of reapportioning the General Assembly (R. 16). They asserted that the General Assembly "has prevented reapportionment by repeatedly failing to take appropriate restorative action" (R. 13–14).

Plaintiffs requested: (1) that a three-judge district court be convened under 28 U.S.C. 2281; (2) that the court enter a declaratory judgment that Article 2, Section 2 of the Delaware Constitution, which established the apportionment of the Delaware legislature, is unconstitutional under the Delaware Constitution, the Fourteenth Amendment, and the Civil Rights Act, 42 U.S.C. 1983; (3) that the court enjoin the defendants from conducting or engaging in any elections held pursuant to Article 2, Section 2 of the State Constitution; (4) that the court either apportion the Delaware legislature in accordance with the population of the State or direct that the general election of November 6, 1962, be conducted on an at-large basis; and (5) that the court retain jurisdiction for the entry of "such other and further relief as may be necessary and proper" (R. 17–18).

2. *The Pre-decision Proceedings in the District Court.*—A three-judge district court was convened

(R. 29–30). On July 25, 1962, the court entered an order staying the proceedings until August 7, 1962, "in the hope and expectation that some appropriate action [might] be taken by the 121st General Assembly" (R. 66–76, 77). 207 F. Supp. 205. The court noted that inasmuch as the Delaware Constitution required the Secretary of State to publish any proposed constitutional amendment in newspapers in each county at least three months prior to the succeeding general election (in this case, the general election of November 6, 1962), it would serve no useful purpose to grant a stay beyond August 7, 1962 (*ibid.*).

On July 30, 1962, the 121st General Assembly approved a proposed amendment (Del. H.B. 534) to Article 2, Section 2 of the Delaware Constitution (R. 275–277; Pl. Exs. 2 and 8). It could not, however, become effective unless adopted by the next session of the legislature.

On August 7, 1962, the district court held that the complaint properly alleged a cause of action within the jurisdiction of the court, and denied motions to dismiss (R. 214–217). 210 F. Supp. 395. The court noted that it had no desire to substitute its judgment for the collective wisdom of the Delaware General Assembly in matters of apportionment of the legislative, but that it had no alternative but to promptly proceed in the matter (*ibid.*). Some of the defendants applied for a further stay of proceedings so that the 122d General Assembly coming into office on January 8, 1963, would have an opportunity to agree to the proposed amendment (R. 219–220).

On August 8, 1962, the plaintiffs applied in the district court for a preliminary injunction in order to enjoin the conduct of the November 1962 general election "until the present discrimination against the Plaintiffs and all others similarly situated is corrected" (R. 224). Thereafter, the court permitted the plaintiffs to amend their complaint (1) to have the proposed constitutional amendment declared unconstitutional as violative of the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. 1983; and (2) to request an order provisionally reapportioning the Delaware legislature (R. 280–282, 316–318).

On October 16, 1962, the district court denied both the applications for a preliminary injunction and for a further stay (R. 319–332, 333). 210 F. Supp. 396. After extended pretrial proceedings, the court, on November 27, 1962, entered a pretrial order in which the parties agreed to the accuracy of a series of exhibits, statistics, statistical computations, and the like (R. 368–400).

In early January 1963, the 122d General Assembly approved the proposed constitutional amendment (Del. H.B. 574) by the requisite two-thirds vote. As a result, the amendment to Article 2, Section 2 became effective on January 17, 1963.

3. *The Evidence.* a. *The apportionment before the 1963 constitutional amendment.*—At the time of the adoption of the Constitution of 1897, Kent County, Sussex County, and "rural" New Castle County (*i.e.*, the area outside Wilmington) were each apportioned 10 representatives and 5 senators (R. 377). The City of Wilmington, which had considerably more popu-

lation than any one of the rural areas, was given 5 representatives and 2 senators (R. 377). The 35 representative districts generally followed the boundaries of a "hundred," a geographical subdivision of a county in Delaware since its founding.[1] Many of the representative districts coincided with a particular hundred; others consisted of a portion of a hundred, or of a hundred and a portion of another hundred, or of two or more hundreds or portions of hundreds. Wilmington City (apparently within the bounds of the ancient Wilmington Hundred) was divided into 5 representative districts (Court Ex. 2, pp. 57–58; Pl. Ex. 23). The 17 senatorial districts, which were likewise specified in the Constitution, were composed either of two representative districts each (the situation applicable to Kent and Sussex Counties), or of two or more hundreds or portions of hundreds (the 3d, 4th, 5th, 6th and 7th districts of New Castle County), or of portions of Wilmington City (the 1st and 2d districts of New Castle County).

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[1] In early England, "hundreds" were subdivisions of counties or shires based upon the number of families of freeholders residing there. Each hundred consisted of ten towns or tithings, and each town or tithing consisted of ten families of freeholders. Each county or shire was composed of an indefinite number of hundreds. 1 Blackstone, *Commentaries*, pp. 114–116.

Hundreds were used as geographic subdivisions in the early days of the colonies of Virginia, Maryland and Pennsylvania. In Delaware, the hundreds are simply ancient subdivisions of the counties established under the authority of William Penn (R. 1019–1020; Court Ex. 2, p. 58). There are 11 hundreds in New Castle County, including Wilmington Hundred, which is coterminis with the City of Wilmington; 9 hundreds in Kent County; and 13 hundreds in Sussex County.

The evidence showed that in the six years prior to the institution of this case, about 7 bills providing for reapportionment of the legislature or for calling a constitutional convention for that purpose were introduced in the General Assembly but were either not reported out of committee or else failed to pass (R. 51–57, 60–65, 271–274, 389; Pl. Exs. 6, 7, 8, and 9).

b. *The apportionment after the 1963 constitutional amendment.*—The amendment to Article 2, Section 2 of the Delaware Constitution, which became effective on January 17, 1963, increased the size of the Senate from 17 to 21 members and allotted the 4 additional senators equally to Sussex and Kent Counties, thereby giving each of the three counties 7 senators (R. 385; Pl. Ex. 8). The sixth senator for Kent County was to be elected at large from the first, second, fifth, seventh, and eighth representative districts of that county; and the seventh senator for Kent County was to be elected at large from the third, fourth, sixth, ninth, and tenth representative districts (*ibid.*). The sixth senator for Sussex County was to be elected at large from the first through the fifth representative districts of that county, and the seventh senator was to be elected at large from the sixth through tenth representative districts of that country (*ibid.*). As a result, each voter in Kent and Sussex County would have been entitled to vote for one representative and two senators.

As for the House of Representatives, the amendment provided that each representative district with a population in excess of 15,000 persons was to be alloted an additional representative for each additional 15,000 persons or major fraction thereof (R. 384;

Pl. Ex. 8). The boundaries of the original 35 representative districts were not affected.[2] The net effect of the amendment in terms of immediate representation in the House would have been to allot an additional 10 representatives to various districts in New Castle County, increasing the size of the House to 45 members (R. 384).[3] The representation of Kent and Sussex Counties would not have been affected.

The populations of each senatorial and representative district, both before and after the 1963 amendment, are set forth in the opinion of the court (R. 496–497, 499, 503–505).

The constitutional amendment also provided that in in the event that a constitutional convention was con-

[2] Districts receiving additional representatives were to be divided so that each of the new districts would elect one representative. The new districts were to be "as nearly equal in population as possible to the other new districts being created" from the same representative district.

The actual reapportionment of representatives and redistricting of the districts was to be performed by a Redistricting Commission consisting of the Governor and the state chairmen of the two political parties receiving the largest vote for governor at the preceding gubernatorial election as advisors to the Governor. The reapportionment and redistricting was to be completed by the Commission within 120 days following the official reporting to the President of the United States of each decennial census. In the event that the Commission failed to act within the 120 days, any qualified voter, within the following 30 days, might, by mandamus or otherwise, compel the Governor to reapportion and redistrict the House of Representatives. These provisions, however, relate solely to the reapportionment and redistricting within the existing 35 representative districts.

[3] The 10 additional representatives would have been alloted as follows: one each to Districts 2, 5, and 8; two each to Districts 7 and 10, and three to District 6 (R. 384, 503).

vened, as provided for in Article 16, Section 2 of the Constitution, the number of delegates and their method of election was not to be affected by the addition of representatives as a result of the amendment. For the purpose of any future constitutional convention, the representative districts were to elect delegates on the basis of the apportionment provided by Article 2, Section 2 as it existed prior to the amendment (R. 387; Pl. Ex. 8). Article 16, Section 2 provides that the General Assembly, by a two-thirds vote, may submit to the voters at the next general election the question whether a constitutional convention to revise and amend the constitution shall be convened, and, if a majority of the people voting at the election approve, the General Assembly must convene the convention. The number of delegates would continue to be 41, one from each of the original 35 representative districts and 2 elected at large from each of the three counties.[4]

4. *The decision and decree of the district court.*— On April 17, 1963, the district court, in an opinion by Circuit Judge Biggs, held that Article 2, Section 2 of the Delaware Constitution, as it existed prior to the 1963 amendment as well as after the amendment, resulted in gross and invidious discrimination against the plaintiffs and others similarly situated, in violation of the equal protection clause of the Fourteenth Amendment. The court could find no rational or reasonable basis for the apportionment under Article 2, Section 2, either before or after the amendment. 215

[4] In addition to other witnesses, three political scientists testified at length at the trial concerning proper methods of apportionment (R. 591–706, 709–886, 890–918, 927–1010, 1166–1295).

F. Supp. at 184–189. The court concluded that the matter of reapportionment was basically a legislative function, and that a further opportunity should be given to the General Assembly properly to reapportion itself in accordance with the Fourteenth Amendment. In this regard, the court noted that minimal constitutional standards required that at least one house of the Delaware General Assembly be apportioned on an "equal population basis" with the overriding aim of "one vote, one person"; and that, with one house so apportioned, other cogent and relevant factors (*i.e.*, history, geography, custom) might be given some weight along with population in apportioning the other house. 215 F. Supp. at 189–191. However, the weight given to such factors "should not be thought of as necessarily destroying the foundation principle of majority rule, or effecting invidious discrimination or irrationality in apportionment." *Id.* at 191. Due to the closeness of the 1964 general election, the court gave the General Assembly until October 1, 1963, to enact a reapportionment statute.

Chief District Judge Wright concurred that Article II, Section 2 of the Delaware Constitution, before as well as after amendment, was unconstitutional, and that at least one house of a State legislature must be apportioned strictly on a population basis. He agreed with the "precatory observation" of Judge Biggs that the upper house must also be based "substantially upon population * * * so long as the majority principle is adhered to." 215 F. Supp. at 195.

District Judge Layton concurred in that portion of the opinion holding Article 2, Section 2 of the Con-

stitution, prior to as well as after the 1963 amendment, unconstitutional as applied to the House of Representatives. Judge Layton pointed out that, since the 1963 amendment did not contain a severability provision, the whole amendment was unconstitutional because of the House provisions and, therefore, no need existed to consider whether the Senate provisions were constitutional. Judge Layton said that it was constitutionally permissible for a State to pattern one house upon an equal area basis where the other house was apportioned upon a "strict population basis" inasmuch as such a system would be patterned upon the Federal Congress. *Id.* at 196–197.

A decree was entered declaring Article 2, Section 2 of the Delaware Constitution to be unconstitutional (R. 536–537). The court reserved jurisdiction to order injunctive or other relief if this appeared necessary. On May 20, 1963, the court enjoined the defendants from conducting any special or primary election, or the general election of November 1964, for the General Assembly under the apportionment provisions of Article 2, Section 2 of the Delaware Constitution as they existed prior to or after the 1963 constitutional amendment. The court again reserved jurisdiction to make such further orders as it might deem necessary (R. 540). The decree does not embody any of the "precatory observations" about the apportionment to be made by the Delaware legislature.

The defendants thereafter filed notices of appeal to this Court. On June 27, 1963, Mr. Justice Brennan stayed the district court's injunction pending dispo-

sition of the case by this Court. Probable jurisdiction was noted on October 21, 1963.

ARGUMENT

INTRODUCTION AND SUMMARY

This is by far the easiest of the reapportionment cases now before the Court on the merits. The apportionment of the Delaware legislature plainly violates any standard of equal protection. Appellants' elaborate argument that a State may model representation in its legislature after the federal analogy is totally irrelevant. The Delaware legislature is constituted upon a radically different basis from the federal Congress, and the apportionment results in gross discrimination that the federal system has never created.[5] Nor is the question raised by the decree

[5] For convenience we list here some of the reasons, discussed in the Argument, showing why this case raises no questions of the constitutionality of a State apportionment of seats in a bicameral legislature analogous to the Congress of the United States:

1. The Delaware House of Representatives is not apportioned in accordance with population. The federal House of Representatives is so apportioned, subject to the very minor qualification that each State is assured one representative. This basic contrast is evident from the fact that a majority of the representatives in Delaware's lower house come from districts containing only 28 percent of the population—less than one-third—whereas it takes, under the constitutional apportionment of Congress, almost half the people to elect a majority of the United States House of Representatives.

2. The Delaware Senators are not chosen as representatives of the counties. The 21 Senators are chosen one each from 21 districts established solely for the purpose of their election. Each Senator represents his district, not the county. The only point of resemblance to the United States Senate is that the

of the district court, which merely adjudicates the unconstitutionality of the present apportionment.

In our briefs and arguments in the previous apportionment cases, we have submitted and sought to justify four basic principles by which the unconstitutionality of a State's apportionment should be determined. There is no occasion to repeat the argument here. In this brief we content ourselves with showing how the four principles apply to this case, supplementing the basic analysis only where necessary to deal with questions brought out in oral argument and inadequately covered in our prior briefs.

The starting point, we argued, should be the arithmetical comparison of the representation accorded qualified voters *per capita*. We discuss the proposition here only to the extent necessary to show that the comparisons of *per capita* representation are a proper measure of the political equality guaranteed by the equal protection clause of the Fourteenth Amendment.

We then turn to the second proposition—that an apportionment which creates gross inequalities in *per capita* representation without any intelligible foundation violates the Fourteenth Amendment—and show that the Delaware apportionment, not as an imaginary "federal plan" but as it actually exists, creates that form of unconstitutional discrimination.

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legislature, in an effort to create an analogy, created the same number of districts in each county.

3. There is no rational basis for the apportionment of seats in either house of the Delaware legislature. The apportionment of seats in each branch of Congress is based upon a coherent political philosophy.

Since counsel suggest no rationalization of the idiosyncrasies that permeate the apportionment of both houses of the Delaware legislature and none are apparent, it may be superfluous to go further; but out of an abundance of caution we submit that any criteria of differentiation offered by way of explanation would be insufficient to justify the discrimination unless relevant to the permissible purposes of legislative apportionment. The critical distinction, which we elaborate below, is between (a) rules serving the purpose of making representative government work better, the operation of which may have the collateral consequence of creating *per capita* inequalities in representation, and (b) rules whose only function is to create classes of voters with preferred political rights giving them voting power disproportionate to their number. Whatever may be true in the first case, the discrimination is unconstitutional in the second.

Finally, we show that the Delaware apportionment violates the equal protection clause because, apart from all else, it creates inequalities in *per capita* representation and submerges the principle of majority rule to a degree so utterly disproportionate to any permissible purposes accomplished as to be arbitrary and capricious. In the Senate there are inequalities in the treatment of voters in different districts within the same county that run as high as 15 to 1. In the House of Representatives there is "one disparity as high as 12 to 1, several at 11 to 1, 10 to 1, and 9 to 1, [and] many at 8 to 1" (R. 510). A numerical majority of the House comes from districts containing only 28 percent of the people. A majority of the

Senate comes from districts containing less than 20 percent of the people. The discrimination runs in the same direction in both houses of the legislature.

I

IN DETERMINING WHETHER AN APPORTIONMENT OF LEGISLATIVE REPRESENTATIVES VIOLATES THE EQUAL PROTECTION CLAUSE, THE BASIC STANDARD OF COMPARISON IS THE REPRESENTATION ACCORDED QUALIFIED VOTERS PER CAPITA

"The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert* v. *Cleary*, 335 U.S. 464, 466. *Baker* v. *Carr*, 369 U.S. 186, 226, shows that this principle is applicable to the apportionment of representation in a State legislature.

To show inequalities in representation, the complainants in the several reapportionment cases, like ourselves, have made many statistical comparisons of the *per capita* representation of the voters of the districts from which representatives were elected. A member of the Court suggested, however, that the resulting ratios were merely sixth grade arithmetic, perhaps lacking relevance to the issues at bar. The comment doubtless was intended to raise the fundamental inquiry, whether the equal protection clause is concerned with uniform apportionment *per capita* or with some broader concept of equal representation. If the latter, do figures showing the *per capita* representation afforded voters in different geographical districts truly reflect the equality or inequality of repre-

sentation, or must the focus be widened to encompass other aspects of State government before one can determine whether the particular governmental system denies some voters equal protection of the law?

Our answer is that State action which gives rise to hostile or capricious discrimination in the *per capita* apportionment of representatives is so related to unequal representation in the larger sense as to violate the constitutional guarantee of equal protection of the law, however fairly other aspects of the State government have been constructed.

Deciding whether an unreasonably discriminatory apportionment of representatives violates equal protection is a more specific task than establishing an ideal form of representative government. One attempting to establish an ideal "representative government" would face, at the threshold, the task of defining "representativeness." Even if it were agreed that a perfectly representative legislature would be a microcosm of the whole people, reproduced in exact proportions, it would still be apparent that the allocation of representatives in exact proportion to the population of the several districts would not alone ensure the objective. Where party loyalties are strong or few issues divide the electorate, skillful gerrymandering of the district lines may enable a minority of the people to elect a majority of the legislature. Even without gerrymandering, a population that was divided 60–40 on a critical issue might conceivably choose a legislature having a unanimous view, because the vote could divide 60–40 in every district.

Thus, the political scientist planning Utopia or the statesman organizing a new framework of government must concern himself with such questions as where the district lines will be drawn, with "wasted votes," and with whether and how to make the legislature reflect the divisions and intensity of opinion within the individual districts. Sundry plans of proportional representation and other devices have been directed at those ends. Nothing we have argued casts doubt upon their constitutionality. Whether the Fourteenth Amendment reaches such questions is not in issue. Any inability to guarantee "equal representation" in the largest sense would be no better reason for upholding an arbitrary classification in apportionment than is the inability to offset all the disadvantages from which the outcast pauper suffers at a criminal trial a reason for withholding from him the transcript necessary for appeal that the rich can purchase. Cf. *Griffin* v. *Illinois*, 351 U.S. 12.

But if the apportionment of representatives among geographical districts in direct ratio to their population is not enough to guarantee "fair representation" in the broadest sense, arbitrary and capricious discrimination in per capita representation will almost always defeat "equality" in any sense of the word. The arithmetical comparisons undeniably measure the comparative influence that the ballot of each voter in different districts can have on the composition of the legislature, and thus on the course of legislation. If one starts with gross and capricious discrimination at that point, it is virtually certain that the inequality will persist. The diversions, dilutions, distortions, and cross-currents that are felt before the votes cast

for representatives are reflected in action on the floor of the legislature, would rarely, if ever, rectify gross inequalities in the ratio of seats to population. No one, to the best of our knowledge, has ever attempted to show that the apparently capricious apportionment of seats in a State like Delaware is intended to offset other inequalities and so ultimately to produce equal representation. The most extraordinary combination of circumstances would be required. There is not the slightest reason to suppose that Delaware's *per capita* divergencies of 12 to 1, 9 to 1 and 8 to 1 as well as the many smaller discrepancies, all scattered as if by a throw of the dice, somehow mysteriously operate to cancel out a hidden gerrymander or other distortions of the *per capita* vote. It would be the wildest coincidence if the members of the Delaware House of Representatives from the grossly overrepresented District 8 in Sussex County, Districts 3, 4 and 6 of Kent County, and Districts 12, 14 and 15 of New Castle County accurately reflected the wishes of those whose candidates lost the elections in the grossly underrepresented districts. It is even less likely that the underrepresented voters of New Castle District 9 are being represented by the representative of an overrepresented district, such as 14 or 15. Even if that could be the fact, it would be no answer to the complaint. Those who raised the cry, "No taxation without representation" could not have been satisfied by an argument that they were being represented in the English Parliament by Edmund Burke and Charles James Fox.

The extent of the legislature's participation in the law-making process is also irrelevant. The equal protection clause does not require a representative legislature, but it does guarantee all voters against arbitrary discrimination in the incidence of any laws creating a legislature and apportioning its seats. Cf. *Griffin* v. *Illinois*, 351 U.S. 12. That the role of the legislature may be confined, or that it may be supplemented by the initiative and referendum, does not affect the problem. For it is no answer to the victims of arbitrary discrimination in respect to the influence of their votes upon the composition of the legislature to tell them that the role of their legislature is less important than in other States, or that there are special ways of making laws in which there is no denial of equal protection.

Since the right to be free from capricious discrimination based upon *no* policy is a personal right, it is immaterial whether the discrimination was adopted, or can be changed, by initiative and referendum or some other exercise of the popular will. The central purpose of the Fourteenth Amendment is to protect minorities. That principle, which is clear in other fields of constitutional law, is controlling here. A simple illustration is enough to put the point beyond dispute. If a State with 21 identical counties, each containing 60,000 voters, divided each of 20 counties into six equal districts, with each district to elect one representative, but allocated only one representative to the twenty-first county, for a total of 121 representatives, it would take representatives elected by 610,000 voters or 48 percent of the population to

elect a numerical majority of the legislature. The entire State, except the victims of the discrimination living in the underrepresented county, might favor the apportionment. Nevertheless, the capricious discrimination would violate the Fourteenth Amendment.

This is also true when the apportionment is attacked under our third basic proposition as an instance of systematic discrimination based upon criteria that are invidious or irrelevant to any of the permissible purposes of legislative apportionment. If the discrimination is based upon grounds condemned by the concept of equal protection, then it matters not that the victims suffer at the hands of a majority of the people.

On the other hand, the ease with which an apportionment can be changed by a majority of the people in a State may be relevant in applying the fourth of the proposed principles—that the equal protection clause is violated by an apportionment which subordinates the principle of popular representation to other permissible considerations to such a degree as to create gross inequalities in the representation of voters and give control of the legislature to small minorities of the people. Under this head the issue turns upon the reasonableness of the balance the State has struck between the interest in equality of representation and opposing objectives that we assume *arguendo* to be permissible objectives of legislative apportionment.[6] The balance depends upon the degree

[6] See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 24–25.

of inequality and submergence of the popular will. If the popular will can find expression in other outlets, such as the initiative and referendum, or if a majority of the people can readily correct the malapportionment, then the degree of minority control of the legislature is somewhat less important than would otherwise be the case. Such institutional arrangements may be relevant to the application of the fourth proposition, therefore, even though they have no bearing upon the others.[7]

While such questions must be answered in any comprehensive rationale, they are not raised in the present case. A majority of the people of Delaware are unable to reapportion the legislature by initiative and referendum or even a constitutional convention.[8] There are no other institutions by which the popular will may express itself in the enactment or repeal of legislation.

A statistical comparison of the *per capita* representation of the voters in the districts into which a State is divided, standing alone, is insufficient to prove violation of the Fourteenth Amendment. The arithmetic leaves open all of the legal questions. It is a

[7] The availability of methods of constitutional reform may also bear upon the propriety of equitable intervention, but no such question is presented here.

[8] The Delaware Constitution may be amended in only two ways: First, an amendment may be passed by a two-thirds vote in both houses of the legislature at two consecutive sessions. Art. 16, § 1. Second, the General Assembly may, by a two-thirds vote, submit to the voters the question whether to hold a constitutional convention. If a majority of voters approve, a convention must be called. Art. 16, § 2. Thus, the legislature has complete power to block any amendment of the constitution.

means of comparison, and for that purpose it is a useful, if not indispensable, tool. Be it easy or difficult, it measures exactly the extent to which the State has introduced a source of discrimination between persons and groups in the influence their *votes* may have on legislation through participation in the choice of representatives in the law-making body. While the process of measurement answers none of the legal issues, its simplicity should not be allowed to hide or denigrate the basic importance of what is being measured—equality or inequality of voting power in the selection of the composite legislature. For unequal voting power almost surely means unequal representation.

II

THE DELAWARE APPORTIONMENT CREATES GROSS DISCRIMINATION AMONG VOTERS WITHOUT A RATIONAL FOUNDATION IN POLICY

The Fourteenth Amendment's condemnation of irrational discrimination as between persons or groups of persons in the incidence of a law is squarely applicable to the apportionment of representatives in a State legislature. *Baker* v. *Carr,* 369 U.S. 186, 226. See also Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes,* No. 29, this Term, pp. 38–39, 50–51, and cases cited.

Under this principle the apportionment of seats in the Delaware legislature is manifestly unconstitutional. Taking the House of Representatives first, the district court in an opinion by an able and experienced circuit judge, found as a fact that there was

"no rational basis for the apportionment" (R. 510). This ultimate finding was based upon such subsidiary findings as that even under the 1963 reapportionment there is (R. 510)—

> one disparity as high as 12 to 1

and also—

> several at 11 to 1, 10 to 1 and 9 to 1

as well as—

> many at 8 to 1.

The district court also found that there are (*ibid.*)—

> vagaries existing in representative districts even contiguous to each other both in rural areas and in the City of Wilmington.

The result, the court pointed out, is to increase the power of favored districts to such an extent that a numerical majority of the Delaware House of Representatives is elected by districts having only 28 percent of the people.

The undisputed evidence fully supports the findings. The population of each district, as the districts were constituted by the 1963 amendment, is set forth below (R. 504):

Sussex County

District	Population
1	9,641
2	6,439
3	9,437
4	5,318
5	8,140
6	8,010
7	6,623
8	2,957
9	4,271
10	12,359
Total	73,195

Kent County

District	Population
1	6,084
2	17,806
3	3,361
4	3,716
5	9,125
6	2,626
7	7,880
8	5,168
9	4,956
10	4,929
Total	65,651

New Castle County (Wilmington)

District	Population
1	7,814
2A	16,886
2B [1]	16,886
3	18,359
4	5,394
5A	15,244
5B	15,244
Total	95,827

New Castle County (Outside Wilmington)

District	Population
6A	14,557
6B	14,557
6C	14,557
6D	14,557
7A	15,836
7B	15,836
7C	15,836
8A	11,714
8B	11,714
9	20,040
10A	13,431
10B	13,431
10C	13,431
11	9,325
12	3,401
13	5,218
14	2,534
15	1,643
Total	211,619
Total New Castle County	307,446

[1] The figures in this table for districts which will be divided under the 1963 amendments assume that the old districts will be divided so the new districts will be exactly equal in population. The governor has, since the opinion of the court below, issued a proclamation forming these districts (Appendix to App. Br., pp. 6a–10a). The actual population figures of these districts are, as far as we can ascertain, not available.

The inequalities are too numerous and too obvious to catalog but it may be permissible to mention the most egregious:

(a) District 15 in New Castle County has 10 times the representation of Districts 2A, 2B and 3 in the City of Wilmington. District 14 has five times the average representation in all seven districts in the City of Wilmington.

(b) There are two districts in Sussex County and five in Kent County that have more than three times the representation of each of five districts in the City of Wilmington.

(c) On the average, a voter in Kent County has just under twice the representation of voters in New Castle County. A voter in Sussex County has more than 1.6 times the representation.

(d) Within each of the three counties (omitting Wilmington) the inequalities are egregious. In New Castle County the smallest district has 12 times the representation of the largest; in Sussex, the ratio is 4 to 1, and in Kent, 6½ to 1.

(e) The net effect of the discrimination in favor of minorities is so great that representatives elected by only 28 percent of the people constitute a numerical majority of the lower house of the legislature.

In the selection of the Delaware assembly, the discriminations between persons and groups in the allocation of voting power are as capricious as they are egregious. There is no meaningful or even consistent policy in the composition of the districts. Although the district lines often correspond to a "hundred"—a subdivision of a county in Delaware (see p. 7,

note 1 above)—they frequently differ. While the representative districts in New Castle County outside Wilmington each formerly consisted of a single hundred, those in Wilmington consisted of two to four wards or portions of wards. In Sussex and Kent Counties, the districts consist of all or part of one, two, or three hundreds. (Even if the district lines were to conform to the ancient "hundreds," that fact would not justify the discrimination because the hundreds have no political or governmental significance.)

Viewed alone, the 1963 amendment was rational insofar as it provided that each representative district should receive an additional representative for each 15,000 people or major fraction thereof above a base of 15,000 people. The districts would then be subdivided. The total effect is to leave the apportionment of seats in the assembly still a crazy-quilt because no changes were made in the districts containing less than 15,000 people. Since there are 25 districts out of a total of 45 in which the ratio of representation is greater even than 1 to 10,000 persons, superimposing a rational rule upon a fraction of an irrational base did little to correct the capricious pattern described above.

Appellants offer no explanation of the gross discrimination in representation in the House of Representatives. The omission speaks volumes, for the case was tried long after the decision in *Baker* v. *Carr* and their brief was filed after the briefs in the first group of apportionment cases had focused attention upon the proposition that gross discrimination in *per capita* representation, resting upon no policy, violates the

Fourteenth Amendment. Appellants' only arguments upon this fundamental issue are that the legislature might have done better if more time had been available, and that over a long period the growth of the population may remove the injustices. The first point is obviously unsound: if the discrimination violates the complainants' constitutional rights, the Court will not rend an adjudication that there is no violation because the continuing wrong was initiated in a hurry. If more time is needed, it can be afforded in framing the decree. The second point is equally untenable: the possibility that time and changes in population may, at some remote day, eliminate the inequalities is not the slightest justification for tolerating the present deprivation of constitutional rights.

The apportionment of seats in the Delaware Senate is equally capricious. The State constitution prior to the 1963 amendment created 7 senatorial districts in New Castle County, each of which was allocated one senator, and 5 districts in both Kent and Sussex Counties, each of which was apportioned one senator, making a total of 17. The 1963 amendment gave Kent and Sussex two additional senators apiece, but it retained the old senatorial districts and superimposed two new floterial districts on each county.* Although

*Rather than disturb the existing districts in Kent and Sussex Counties, the Delaware Legislature gave each county two additional Senate districts by having part of each county elect one of its additional senators and the other part elect the other, in addition to the Senators from the five existing districts. We have difficulty in following appellants' assertion (Brief, p. 9) that the districts were formed by dividing the

each county is now allocated an equal number of senatorial districts in an apparent effort to justify the gross discrimination in *per capita* representation by reference to the United States Senate, the differences are plain. Delaware's senators do not represent the counties but geographical districts within the counties. The composition of the districts, within the counties, has no intelligible basis, as shown by the following table (R. 385, 505):

State into eastern and western halves, for the new seventh district in Kent County and the new sixth district in Sussex County stretch from the eastern half to the western half of the State. As a result, every voter in Kent or Sussex County votes for two senators; one from the pre-1963 district and one from the new floterial district in which he lives, while in New Castle County a citizen votes for only one senator (R. 386–387, 516).

The district court held this discrimination to be unconstitutional. We pretermit the question because the apportionment is unconstitutional however the question be decided. If each of the three counties had the same population and the districts within each county contained the same numbers of people, a mathematical argument could be made for the proposition that there was substantial equality. This can best be shown by an example: If each county had 70,000 people and seven senators, each voter in New Castle would be in a district of 10,000 people and would therefore elect 1/10,000 of a senator. On the other hand, voters in Kent and Sussex Counties would each be in two districts, one with 14,000 people and one with 35,000. They would therefore elect 1/14,000 of a senator plus 1/35,000 of a senator, which is 1/10,000 of a senator. We are not prepared to say, however, that the mathematical equality means that there is no substantial discrimination.

New Castle County		*Kent County*		*Sussex County*	
1	52,131	1	23,890	1	16,080
2	43,696	2	7,077	2	14,755
3	64,345	3	17,005	3	16,150
4	64,820	4	7,582	4	9,580
5	63,734	5	10,097	5	16,630
6	14,543	6[1]	(46,063)	6[1]	(38,975)
7	4,177	7[1]	(19,584)	7[1]	(34,220)
Total	307,446	Total	65,651	Total	73,195

[1] These are floterial districts which, between them, cover the entire county. See pp. 28-29, note 9 above.

Voters in the most overrepresented district in New Castle County have more than three times the representation of voters in any other New Castle district; they have more than 15 times the representation of the voters in the three most underrepresented districts. Voters in the second most overrepresented district in New Castle County have four times the representation of voters in three other districts. In Kent County disparities run in the ratio of 2 and 3 to 1. In Sussex County one district has 1½ times the representation of any other. Every district in Sussex County has six times the representation of the voters in the three most populous districts in New Castle County. The result of the disingenuous effort to make the apportionment of the Delaware Senate look like the composition of the Senate of the United States was greatly to increase the overrepresentation of the voters of Kent and Sussex Counties.

We can discover no explanation for the idiosyncrasies in the senatorial apportionment and districting: Appellants suggest no explanation whatever, save the obviously false analogy to the United States Senate.

The analogy would be false even if the relationship of a county to a State were like that of a State to the United States. In the United States Senate, the Senators represent their States and are chosen by the people thereof. In the Delaware Senate, the Senators come, not from the counties, but from geographical districts within the counties and are chosen by the people of the districts. There is nothing in the composition of the United States Senate remotely comparable to Delaware's gross and capricious discrimination in the representation of voters in different senatorial districts within a single county. Consequently, there is no need to discuss here whether the so-called "federal analogy" is pertinent in a State which apportions one branch of the legislature according to population and arranges to have its counties represented in the upper house in the same manner as the States are represented in the United States Senate.[10] The portions of the opinion below dealing with this subject are no part of the decree.

It follows that the apportionment of representation in the Delaware legislature denies the complainants equal protection of the law.

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[10] See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 73–82.

III

EVEN IF THE APPARENTLY CAPRICIOUS APPORTIONMENT OF THE DELAWARE LEGISLATURE HAD AN INTELLIGIBLE FOUNDATION, THE DISCRIMINATION WOULD VIOLATE THE EQUAL PROTECTION CLAUSE UNLESS BASED UPON CRITERIA RELEVANT TO LEGISLATIVE APPORTIONMENT

1. *The principle*

Since the districting and apportionment of representatives in elections for both branches of the Delaware legislature apparently has no intelligible foundation of any kind, it is probably superfluous to discuss which criteria of systematic differentiation might be constitutionally acceptable and which would violate the Fourteenth Amendment. But because some rationalization may be suggested, and because the oral argument of the previous reapportionment cases refined (but did not change) our analysis, we reiterate the proposition that a discriminatory apportionment violates the equal protection clause unless the differences in *per capita* representation bear a rational relationship to permissible objectives of legislative apportionment. See Briefs for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 39–43, and *WMCA, Inc.* v. *Simon*, No. 20, this Term, pp. 20–33.[11]

[11] Strictly speaking, the crazy-quilt test is probably insufficient standing alone. It must be applied in company with an additional rule, either implicit or explicit, that separates the permissible and impermissible bases of discrimination. If a State may prefer farmers over store-keepers in matters of apportionment, bankers over wage-earners, port cities over manufacturing centers, cities with a population of between 20,000 and 50,000 over both towns with less than 20,000 and cities with more than

In those briefs we suggested but did not adequately articulate the critical distinction between permissible [12] and impermissible objectives of legislative apportionment. The distinction is between (a) rules serving the purpose of making representative government work better, the operation of which may have the collateral consequence of creating *per capita* inequalities in representation, and (b) rules whose only function is to create classes of voters with preferred political rights disproportionate to their number, which we say are impermissible.

A legislature need not be simply a mirror to public sentiment like a Gallup poll. A legisature is a deliberative body, and deliberation requires knowledge. For that reason it might be thought to "make representative government work better" to take steps to ensure that representatives in one house of the legislature come from geographical districts small enough for them to know the distinct problems of every

50,000 and so forth, and if the rationalization can be supplied after the event because the Court cannot plumb the legislatures' true motives, then anyone with sufficient time and imagination could always find somewhere in the jumble of facts and potential policies some rule or compromise between many conflicting rules that would rationalize the apportionment. Compare the dissenting opinion of Mr. Justice Harlan in *Baker* v. *Carr*, 369 U.S. 330, 333–344.

In a case like *Baker v. Carr* or the instant case, there is hardly need to formulate the implicit limitation upon the acceptable kinds of rationalization, for the apportionments are so capricious and internally inconsistent that the defendants may be required to come forward with any explanation in terms of State policy and judgment will go against them if they fail.

[12] As repeatedly pointed out in these briefs, we assume them to be permissible for the purpose of these cases. See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 24–25.

locality, whether a unique local industry or a special need for schools or roads and bridges. Nantucket and Martha's Vineyard in Massachusetts are excellent examples. Geographically small districts might also be thought to enable the people to know their representatives better. Again, a legislature might conceivably be better informed and more representative if the apportionment recognized political subdivisions with an historic coherence and identity of their own. In an earlier age local political subdivisions formed a meeting place for discussion and the interchange of ideas, and the representative who went up to the legislature was speaking for the consensus in that community rather than for so many individuals. Even today the town hall or county court house may serve as the nerve center of a political organism attuned to local needs and opinions.

A legislature may also be better informed and more representative, in the sense that it is closer to its constituents, if there is a measure of continuity and stability in political arrangements; thus a State may limit the frequency with which it reapportions the legislature. Since effective political organizations help to make a legislature representative in this sense, a State might desire to conform the boundaries of election districts to the boundaries of local political subdivisions in order to reduce the number of geographical entities for which a separate organization must be created.

The foregoing illustrations are suggestive, not exclusive. We consider below (pp. 45–48) whether there is any limit upon a State's freedom in making an

apportionment on the basis of rules that serve the foregoing functions. Our point here is that those rules are different from differentiations or classifications among voters whose only function is to give farmers more representation than wage earners, shipping interests more representation than the manufacturing community, city dwellers more than suburbanites, or Protestants more than the Jews. The latter kind of distinction, when applied to political rights including representation, is the very antithesis of equality before the law. "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government." *South* v. *Peters*, 339 U.S. 276, 279 (Justices Black and Douglas dissenting).

We find the support for this proposition in four areas. *First*, the principle that the policy knows no distinction in the political worth of one man as opposed to another, or of one group as opposed to another, is a fundamental strain in our political philosophy. The long appendix to our brief in the Maryland case shows the extent to which the idea of equal representation *per capita* was accepted in the Constitutional Convention of 1789 and the ratifying conventions as a principle applicable to any government dealing directly with its citizens. Two qualifications were widely accepted, but neither is relevant here. One was the principle that in a federation of sovereign States the States should have equal representation. That principle is manifestly inapplicable

within a State and, at most, it would justify representation by political subdivisions, not the creation of preferred classses. The other qualification was the view that there should be an upper house not directly chosen by the people. This was the theme of the remarks by Governor Randolph which the amicus brief of the Attorneys General of several States in the Maryland case cites (pp. 36–37) along with a quotation from James Madison in an effort to show that the constitutional convention was not in agreement that State legislatures ought to be apportioned according to population. Randolph's views upon the indirect election of the upper branch have nothing to do with the geographical apportionment of representatives elected by the people. His statement on the latter point unequivocally supports our reading of the records. Appendix B to the government's brief in the Maryland case, pp. 51–52. The burden of the quoted passage from Madison is unclear, but he often insisted that representatives should be apportioned in direct ratio to population. *Id.* at 4, 15–16, 22–24, 27, 32, 38–39, 45, 48, 53, 60–61, 70–71, 117–118. The only proposals to weight apportionment so as to preserve the political power of the original States were rejected.[13] *Id.* at 40, 50, 53.

The thrust of the Fourteenth Amendment is toward the elimination of all class distinctions in the exercise of political and other civil rights. There are no qualifications upon the equal protection clause. It

[13] For the possible convenience of the Court we have set forth in the Appendix an analysis of the historical materials in the brief of the State Attorneys General.

has general application. It has been applied specifically to laws dealing with participation in democratic self-government. *Nixon* v. *Condon*, 286 U.S. 73; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 349 (Mr. Justice Whittaker concurring); *Gray* v. *Sanders*, 372 U.S. 368. Nothing could be more inconsistent with the basic spirit of the Amendment than the creation of special political classes with preferred voting rights or preferred representation..

There is nothing to the contrary in the history cited by appellants. The constitutions of the States readmitted to the Union after the enactment of the Fourteenth Amendment were all before the Court in *Baker* v. *Carr*, despite appellants' claims of originality, for Mr. Justice Frankfurter developed essentially the same arguments in his dissenting opinion in an effort to show that the Amendment is not concerned with legislative apportionment. 369 U.S. 186, 266, 315–317. The Court found the history unpersuasive, doubtless because it fails to show that Congress either concerned itself with the apportionment provisions of the State constitutions or was aware of their practical consequences. In addition, nothing is more apparent than that the limits of the guarantee of equal protection as applied in 1963 are not to be found in the constitutions and laws of the several States during the Reconstruction Period. See pp. 52–56 below. Even if it were otherwise, appellants' argument would be irrelevant to the point that we are now making—that our whole political history rejects the creation of fa-

vored political classes as a legitimate function of election laws or the apportionment of representatives."[14]

Although practice often fell short of the professed ideal,[15] each stage in our history has brough the ideal of *per capita* political equality closer to reality. As the Court said in *Gray* v. *Sanders*, 372 U.S. 368, 379–381:

> The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.
>
> * * * * *
>
> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Occasionally, one finds a political figure praising the unique virtue of the rural voter or defending the preferred voting power of special interests, but we know of no eminent statesman or political philosopher who has avowed the view it is proper to weight the legislature so as to assign to the farm interests, the wage-

[14] We have shown above the irrelevance of appellants' historical arguments as an answer to the fundamental defect charged against the Delaware apportionment—that it introduces gross and capricious discrimination into the apportionment of both houses of the legislature without even an intelligible foundation. See pp. 23–31 above.

We show below that the history, even if otherwise relevant, does not support such gross inequalities in both houses of the legislature as exist under Delaware's current constitution.

[15] There is scant support in practice for the extreme discrimination in many States today, which is chiefly a consequence of the more rapid growth of cities and suburbs.

earning interest, the urban interest, or any other class of voters political power disproportionate to its number.

Second, the practice in framing State constitutions bears out this contention. The central principle, quite uniformly, has been to base representation primarily upon population.[16] There are qualifications and limitations but they are nearly all consistent with the basic distinction which we are emphasizing. The limitations have been addressed, with rare exceptions, to making the legislature more representative by avoiding the creation of excessively large districts, by recognizing the coherent and independent identity of historic political subdivisions, by preserving a measure of stability, etc. No State constitution has ever openly espoused the view that it is a proper function of apportionment to allocate power to different social or economic classes out of proportion to their numbers. Few have provided for discrimination against populous areas merely because they are populous.[17] The practice has sometimes been different, but our shortcomings are not the measure of constitutional protection.

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[16] A brief survey of State constitutions is set forth in our brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 30–31. See also the dissenting opinion of Mr. Justice Frankfurter in *Baker* v. *Carr*, 369 U.S. 266, 309–318.

[17] New York systematically discriminates against citizens in counties having more than 6 percent of the State's population.

Maine, Oklahoma, Pennsylvania and Rhode Island limit the number of representatives a single city or town may have in one or both branches of the legislature. The Pennsylvania limitation has no practical effect because no city, on the basis of population, is entitled to more than the limit.

Third, it is plain that in closely related areas the equal protection clause prohibits the kind of discrimination which we are discussing. No one would argue that a State might deny the vote to bankers, or wage earners, or lawyers, or farmers. It seems equally clear that in electing a legislature it cannot, consistently with the Fourteenth Amendment, give 10 votes to every banker, 5 to every wage earner, 1 to every lawyer, or 50 to every farmer. How then can the State accomplish the same discrimination by giving some classes greater representation *per capita* and others less, in apportioning the seats?

Fourth, following the last point a step further, we submit that *Gray* v. *Sanders* is decisive of the point at issue. There, the Court squarely rejected the argument that the votes in rural areas could be weighted more heavily than votes in urban areas in choosing a governor (372 U.S. at 379):

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.

If the rural voter is not entitled, by reason of his interests or residence alone, to have the State give him a greater voice in the selection of a governor than an

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The Rhode Island Supreme Court has held the Rhode Island limitations unconstitutional. *Sweeney* v. *Notte,* 183 A. 2d 296. Georgia, Maine and Texas give somewhat less representation *per capita* as the population of an area increases.

urban voter, then the rural voter is not entitled, by reason of that fact alone, to have greater representation in the legislature. This is not to say that *Gray* v. *Sanders* is decisive upon all aspects of the State apportionment cases. It is different because a legislative apportionment, unlike an election within a given area, may serve functions, such as those we have outlined, the achievement of which requires some departure from *per capita* equality of representation. An apportionment that serves such a purpose is not invalid merely because it happens to result, if measured by *per capita* representation, in classifications more or less corresponding to economic, occupational, or geographic groups. But *Gray* v. *Sanders* necessarily holds that the equal protection clause prohibits giving some classes of voters more weight than others on the ground that they have unusual virtue or special importance.[18]

The point may be clarified by a simple example. Assume a State with four counties, each with a population of 50,000 and also identical in every other respect save that one county, Pollak County, is pastoral:

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[18] We have discussed above (pp. 16–23) the reasons for rejecting any distinction based upon an argument that although *per capita* comparisons measure equality in an election within a single constituency they do not truly measure equality or inequality in a representative body.

Spritzer County		*Friedman County*	
Population	50,000	Population	50,000
Unit Votes	10	Unit Votes	10
Representatives	10	Representatives	10
Barnett County		*Pollak County (Pastoral)*	
Population	50,000	Population	50,000
Unit Votes	10	Unit Votes	31
Representatives	10	Representatives	31

Gray v. *Sanders* squarely holds that the discrimination inherent in giving the 50,000 people of Pollak County 31 unit votes in the election of a governor as opposed to the people of Spritzer, Friedman and Barnett Counties, who receive only 10 unit votes apiece for 50,000 people, cannot be justified by an alleged State policy of fostering the pastoral way of life. It follows that the policy is equally irrelevant as a justification for giving Pollak County 31 representatives in the legislature as opposed to the 10 representatives apiece allocated to the other counties despite their identical size and population. The equal protection clause bars laws which serve only the function of creating of favored political classes whether it be in the choice of a governor or the selection of a legislature.

We recognize that such distinctions are not unconstitutional in every context. In enacting tax or regulatory laws and in granting appropriations or other benefits, a State is free, within reason, to encourage one industry or discourage another, to protect the wage earner against the employer or the employer

against the union, etc. It may take into account the special problems of the farmer as opposed to the consumer and grant exemptions or privileges not accorded to others. But that kind of classification, we submit, is not permissible in respect to political rights. The Fourteenth Amendment guarantees the rich and the poor, the banker and the wage earner, the farmer and the city dweller, like the Catholic and the Protestant, equality before the law defining the opportunities for participation in self-government.

Precedent amply sustains the view that differentiations which may be permissible in one context become irrelevant in another. A man's income may be relevant for purposes of taxation, but since it has no bearing upon his guilt or innocence when charged with crime, a State cannot give an appeal to the man who can afford to buy a transcript but deny it to one who is too poor. *Griffin* v. *Illinois*, 351 U.S. 12. The nice lines between larceny and embezzlement may be constitutionally acceptable in the ordinary administration of criminal justice but not in relation to so fundamental a human right as procreation. *Skinner* v. *Oklahoma*, 316 U.S. 535.

2. *Application to the instant case*

We can discover *no* policy to support the capricious discriminations in the apportionment of both branches of the Delaware legislature. *A fortiori* there is none that can be defended as relevant to the permissible purposes of legislative apportionment. Delaware's apportionment nowise resembles the State constitutions that guarantee each county at least one repre-

sentative, or provide for an upper branch made up of representatives of the counties, chosen by the equal votes of all the county's citizens.

Appellants state (Br. 9) that the two additional senators given to Kent and Sussex Counties by the 1963 amendment were allocated to the eastern and western halves of each county. Since one new district in each county extends across the whole State, we question the accuracy of the assertion. Even if accurate, it is irrelevant. Surely the distinction between the eastern and western halves of Kent County is not an adequate justification for constituting the districts so that District 7 with a population of 19,584 has the same representation in the Senate as District 6 with a population of 46,063, a ratio of worse than 2 to 1. And, of course the method of apportioning the two additional seats given to each of the two counties does nothing to justify the gross inequalities not only between the counties but among the districts within the counties.

Nor is there any indication that senators or representatives are distributed on the basis of area in an effort to give each part of the State representation in the legislature. The contrary appears clear from the widely differing size of the districts. Moreover, districts large in area often have greatly more population than those much smaller, yet each has only one representative. For example, the second representative district of Kent County has well over twice the population and size of that county's seventh district. The tenth representative district of Sussex County has almost three times the population and size of that

county's ninth district. The first senatorial district of Kent County has one-third more population than the third district although the former is approximately four times larger.

The boundaries of the ancient "hundreds" (see p. 7 above) play some part in the districting, but it is plain that they neither explain nor justify the inequalities. Sometimes hundreds or portions of hundreds are combined; sometimes they are subdivided. Furthermore, it is plain that the hundreds have no governmental functions or other meaningful identity that could be supposed to give its representation as such a useful function in making representative government work better.

IV

THE APPORTIONMENT OF THE DELAWARE LEGISLATURE VIOLATES THE EQUAL PROTECTION CLAUSE BY SUBORDINATING POPULAR REPRESENTATION TO THE REPRESENTATION OF POLITICAL SUBDIVISIONS TO SUCH A DEGREE AS TO CREATE GROSS INEQUALITIES AMONG VOTERS AND GIVE CONTROL OF BOTH HOUSES OF THE LEGISLATURE TO SMALL MINORITIES OF THE PEOPLE

Apart from the fatal defects already discussed, the apportionment of the Delaware legislature is unconstitutional because any otherwise permissible objectives that disparities in *per capita* representation might be supposed to secure are insufficient to justify such gross inequalities and total disregard for the principle of majority rule as exist in the selection of representatives to both the Senate and House of Representatives. As we have shown in our previous briefs, objectives that might furnish acceptable justification

for some variations from equal representation *per capita*[19] become so relatively inconsequential as to render the discrimination arbitrary and capricious where the inequalities are grosser and the principle of majority rule has been totally submerged in both houses of the legislature. See especially Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, pp. 46–50, 57–73.

Measured by any reasonable standard, the apportionment of the Delaware legislature creates gross inequalities among voters and allows a small minority to control the legislature. We have seen above (pp. 24–30) the wide disparities of voting power among persons residing in the various counties and senatorial and representative districts. The disparities are as high as 15 to 1 in the Senate and 12 to 1 in the House of Representatives. There are gross disparities between districts within the same county as well as across county lines.

A majority of the members of the House is elected by persons residing in districts with only 28 percent of the population. A majority of the Senate is elected by persons residing in districts with only 21 percent of the population—a reduction of 1 percent

[19] Since the instant case, like the State apportionment cases, argued earlier this Term, can be decided without ruling upon whether the Fourteenth Amendment requires substantially equal representation *per capita* in both houses of a State legislature, we assume here, as we have in those cases that there may be permissible objectives of legislative apportionment that would justify some departure from equality *per capita*. The asssumption is made *arguendo* reserving further judgment until the issues are presented.

as a result of the 1963 amendments. The Delaware legislature considered as whole is worse apportioned than any of the States involved in the State apportionment cases argued last month. Indeed, measured by the percentage of votes able to elect a majority of the two houses, it is the third worst apportioned legislature in the country.[20]

The discrimination in both houses seems to run almost entirely in favor of the same areas. For example, the two least populous house districts in the State (numbers 14 and 15 in New Castle County), comprise the least populous senatorial district (number 7 in New Castle County). The second and third least populous districts in Kent County (numbers 3 and 4), form the least populous Senate district in that county (number 2). The least and fifth least populous house districts in Kent County (numbers 6 and 9) form the second least populous Senate district in the county (number 4). The least and fifth least populous house districts in Sussex County (numbers 7 and 8) form the county's least populous Senate district (number 4). Conversely, the 20 most populous house districts (New Castle County numbers 2A, 2B, 3, 5A, 5B, 6A, 6B, 6C, 6D, 7A, 7B, 7C, 8A, 8B, 9, 10A, 10B, 10C; Kent County number 2; Sussex County number 10) are in seven of the eight most populous Senate districts (New Castle County numbers 1, 2, 3, 4, 5; Kent County number 1; Sussex County num-

[20] The worse apportioned legislatures from this standpoint are Florida and Nevada. Maryland is approximately the same as Delaware. This ranking has been calculated by adding together the percentage of the voters needed to elect a majority of each of the two houses of the 49 bicameral State legislatures.

ber 5); only the seventh most populous Senate district (Kent County number 3) is formed of less populous house districts.[21]

In short, the inequality in each house adds to the inequality in the other. We submit that, where, as here, a small part of the people is given complete control of the legislature, the apportionment violates the Fourteenth Amendment regardless of any justification that can now be advanced. The justifications sometimes put forward by larger States would carry less weight here even if they fitted the apportionment. Delaware is the second smallest State in the country. Seventy-one senators and forty-one representatives would, if apportioned directly on the basis of population, still represent extremely small districts. Kent County, the least populous county, would still be entitled to three senators and six or seven representatives for an area of less than 595 square miles—an average of less than 100 square miles per representative.

It is plain that the analogy appellants seek to draw between the apportionment of the Delaware legislature and the Congress of the United States is no answer to the point we have been making. There is plainly no analogy, among other reasons because the actual apportionment of the Delaware legislature bears no resemblance to the constitutional apportionment of the Congress.

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[21] In considering the Senate districts, we have not included the Senate districts created by the 1963 amendments in Sussex and Kent Counties which overlap with the earlier districts.

First, the Constitution of the United States provides an obviously intelligible basis for apportioning Congress. Each State is entitled to two members of the Senate. Art. I, Sec. 3. The members of the House of Representatives are apportioned on the basis of population, except that each State is guaranteed a minimum of one. Art. I, Sec. 2. In contrast, as we have seen above (pp. 23–31), the apportionment of both houses of the Delaware legislature is a crazy-quilt, having neither rhyme nor reason. Both the Senate and House districts vary widely in population without any intelligible explanation.

Second, the limitations on apportionment based strictly on population in the Constitution concerning the United States Congress are relevant to the representative process. They are intended to give each State, *i.e.*, each political subdivision, equal representation in the Senate and minimum representation in the House of Representatives. Delaware's apportionment has no comparable objectives.

Third, even if it were not a crazy-quilt, the Delaware Senate is not apportioned like that of the United States. While each county has seven senators, the Senate is actually elected from districts within the counties rather than by the counties themselves. These districts are merely arbitrary units formed for election purposes which are unequal in population. Thus, unlike the United States Senate, the Delaware Senate does not consist of representatives of govern-

mental subdivisions which are given equal numbers of legislators who represent the subdivision on a corporate basis. Instead, the Delaware Senate is composed of representatives from individual districts with no corporate existence or governmental significance apart from elections.

Fourth, the apportionment of the Delaware House of Representatives is so lacking in relation to population that a numerical majority comes from districts containing only 28 percent of the people. The history of the Constitution and its ratification shows that the framers intended that the federal House of Representatives would be apportioned between the States on the basis of population. While each State is assured of at least one Representative, it is clear that the framers expected that each State would have enough population to entitle it to one Representative without this guarantee. Thus, the Constitution sets the minimum ratio of Representatives to population at one to 30,000 (Art. I, Sec. 2), which was below the population of any of the States at the time. And the first apportionment of the House of Representatives, which is contained in the Constitution itself (Art. I, Sec. 2), gives more than two representatives to every State except Rhode Island and Delaware, and those two States would have been entitled to such representation on the basis of their population.

Today only four States have less than 1/435 of the population.[22] All have over half the ratio and would be entitled to a representative, even without the mini-

[22] Vermont, Wyoming, Nevada, and Alaska.

mum guarantee, under the equal proportions method of allocating representatives which Congress now follows. 2 U.S.C. 2a. Thus, the federal House of Representatives, in effect, is apportioned by the Constitution among the States almost exactly in conformity with population. It takes representatives from States with almost 50 percent of the population to constitute a majority of the House.[23]

The apportionment of the Delaware House of Representatives between counties is based only partially on population. New Castle County is guaranteed fifteen representatives and Kent and Sussex ten apiece; thus, 35 of the present 45 representatives are allocated wholly without regard to population.[24] Furthermore, the 35 representatives are distributed within the counties with no real regard for population, being elected from grossly unequal districts arbitrarily established

[23] Unfair districting within the States by the State legislatures, however, has resulted in having a majority of representatives elected from *districts* having only 42 percent of the population. Such unfair districting is probably unconstitutional. See the government's brief in *Wesberry* v. *Sanders*, No. 22, this Term, pp. 30–35.

[24] In addition, the other ten representatives are allocated according to the population of arbitrarily formed election districts rather than on a basis of the population of the county as a whole. Thus, a county could be given additional representation if one of its districts was populous even though the other districts were so unpopulous that the county as a whole would be entitled to no more representation. At present, this has not occurred since only the most populous county, New Castle, has received additional representation under the 1963 amendment. However, if the second representative district of Kent gains less than 5,000 people it will receive an additional representative although the county as a whole is overrepresented now.

for election purposes. The net result is that only 28 percent of the people of Delaware live in districts electing over half the State House of Representatives. The federal analogy, therefore, does not apply, since Delaware does not apportion either house of the legislature on the basis of population.[25]

Nor can anything be found in the history of the readmission of the seceded States that supports the notion that the equal protection clause permits the gross discrimination in *per capita* representation found in both houses of the Delaware legislature. In the first place, as the history set forth by the appellants shows, Congress did not even advert to the problem of apportionment in readmitting the Southern States.[26] For, at that time, unlike the time

[25] Even if the apportionment of the Delaware General Assembly was factually similar to the apportionment of Congress, the federal analogy would not apply. The equality of representation by States in the United States Senate recognized that the new government was in part a continuation of the old confederation of sovereign States. See our brief in the Maryland case, pp. 73–82. Whether or not the three counties of Delaware were sovereign for three months in 1776 as appellants contend, they are today "nothing more than political subdivisions of [the] State[s]" with "restricted powers and duties" delegated by the legislature. *State* v. *Warwick*, 108 A. 2d 85, 89 (Del. Superior Ct.). And of course the application of the Fourteenth Amendment depends on present facts and circumstances. *Brown* v. *Board of Education*, 347 U.S. 483, 492–493.

[26] Appellants state (Br. 67) that "the Federal pattern for a legislature was discussed in the course of the debates." The relevant "excerpts from the debates" included in appellants' brief (pp. 112–132) contain no discussion whatever of the apportionments provided in any of the State constitutions under examination. Perhaps appellants' are referring to a speech by Senator Sumner (App. Br. 119–121) which discusses the equality of the States under the 1789 Constitutions, and par-

of the adoption of the original Constitution and again during the last few decades, apportionment was not an issue of major importance. There is no way to know whether, if the issue had been squarely posed, Congress would have considered that the equal protection clause applied to apportionment of State legislatures at all and, if it did, what standards were appropriate.

Second, this Court long ago made it clear that the protection afforded by the Fourteenth Amendment cannot be limited by historical research into the conscious intent of its framers. In *Brown* v. *Board of Education*, 347 U.S. 483, massive briefs and "[r]eargument [were] largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. [They] covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of the proponents and opponents of the Amendment." *Id.* at 489. Despite this extensive historical analysis, the Court found that history was "inconclusive" (*ibid.*):

> The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all per-

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ticularly equal representation in the Senate." However, Senator Sumner does not even suggest that this equality among sovereign States is relevant to the apportionment of State legislatures. Indeed, he explicitly stated that he was speaking on an entirely different subject ("What I have to say today will be confined to a single topic. I shall speak of the *validity and necessity of fundamental conditions on the admission of States into the body of the Nation* * * * (emphasis in original)). 80 Cong. Globe 3024.

> sons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

Furthermore, the Court went on to say that "[i]n approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even in 1896 when *Plessy* v. *Ferguson* was written." *Id.* at 492.

The silence as to apportionment leaves the historical issue in this area even more uncertain. The history that appellants invoke was all brought to the Court's attention in *Baker* v. *Carr* by the dissenting opinion of Mr. Justice Frankfurter. The argument was rejected.

Finally, appellants' history, even if otherwise persuasive, does not sustain the present Delaware apportionment. At most, the history shows that some deviations from *per capita* representation in the readmitted States provoked no objection. There is no evidence that Congress knew of them; nor that it knew whether they were large or small. In point of fact, five of the State constitutions, as appellants admit (Br. 57), provided for the apportionment of both houses on the basis of population. In the other five the disparities were small compared to those existing today in Delaware. The South Carolina Constitution of 1868 provided for a Senate composed of one senator for each county, except Charlestown County was to receive two, and a House of Representatives apportioned according to population except

that each county was given one. As a result, 36 and 44 percent of the people lived in counties electing a majority of the two houses.

The Georgia Constitution of 1868 provided no standard for the reapportionment of either House. The initial apportionment specified in the Constitution grouped three counties into each single-member senatorial district and gave three seats in the House to the six largest counties, two seats to the next 31, and one to the rest. Consequently, 36 and 37 percent of the people lived in counties electing a majority of the two branches.

In Florida, the 1868 Constitution apportioned the Senate by districts without stating any standard and gave a representative for each county and an additional representative for each 1,000 "registered votes." A majority of both houses could be elected by persons residing in counties with 33 and 27 percent of the people, respectively.

The Louisiana Constitution of 1868 provided no standard for apportioning the Senate, but apportioned the House of Representatives on the basis of population with each parish receiving at least one member. Under the initial apportionment specified in the constitution, 48 and 40 percent of the people lived in counties electing a majority of the two houses.

Finally, the Virginia Constitution of 1870 provided no standard for apportionment. The initial apportionment specified in the Constitution resulted in 44 and 40 percent of the people residing in counties electing a majority of the legislature.

Except for Louisiana, the percent figures are based on the 1870 census because the Civil War caused significant relocation of population. In no State did the

malapportionment approach the severity of that now existing in Delaware.

V

THE INJUNCTION ORDERED BY THE DISTRICT COURT IS NOT AN ABUSE OF DISCRETION

The district court, after holding unconstitutional the provisions of the Delaware Constitution apportioning seats in the State legislature, entered a declaratory judgment and later enjoined the appellant election officials from holding elections thereunder. Since, as we have shown above, this determination was correct, the district court was acting well within its discretion in enjoining the existing apportionment. The traditional remedy when a State statute is held unconstitutional is to enjoin further action thereunder. *E.g., Ex parte Young,* 209 U.S. 123. The State and lower federal courts have in numerous cases used this remedy in the field of apportionment. *E.g., Sims* v. *Frink,* 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims,* Nos. 23, 27, 41, this Term; *Davis* v. *Mann,* 213 F. Supp. 577 (E.D. Va.), pending on appeal, No. 69, this Term; *Thigpen* v. *Meyers,* U.S. D.C., W.D. Wash., decided May 3, 1963, pending on appeal, No. 381, this Term; *Scholle* v. *Secretary of State,* 367 Mich. 176, 116 N.W. 2d 350; *Parker* v. *State,* 133 Ind. 178, 32 N.E. 836; *Denny* v. *State,* 144 Ind. 503, 42 N.E. 929; *Brooks* v. *State,* 162 Ind. 568, 70 N.E. 980; *Ragland* v. *Anderson,* 125 Ky. 141, 100 S.W. 865; *Armstrong* v. *Mitten,* 95 Colo. 425, 37 P. 2d 757; *Stiglitz* v. *Schardien,* 239 Ky. 799, 40 S.W. 2d 315; *Rogers* v. *Morgan,* 127 Neb. 456, 256 N.W. 1; *State ex rel. Lamb* v. *Cunningham,* 83 Wis. 90, 53 N.W. 35; *State*

ex rel. Attorney General v. *Cunningham*, 81 Wis. 440, 51 N.W. 724; *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, 713–714.

Appellants contend (Br. 98–110) that the Delaware legislature should have been given the opportunity to reapportion itself before the injunction was issued. The legislature had already had the opportunity. After indicating doubt about the existing Delaware apportionment, the court in a pre-trial order gave the legislature time to act (R. 66–76).[27] The deadline was fixed to meet the requirements of Delaware's election laws (R. 75–76). The legislature, in response, passed a constitutional amendment at two successive sessions.[28] In the Senate, the amendment gave the already-over-represented counties, Kent and Sussex, two additional members apiece. The existing wide disparities in senatorial districts within the counties (see pp. 28–30 above) were left unchanged and the percentage of people living in districts which elected a numerical majority of the Senate was reduced from 22 to 21

[27] Several other courts have likewise delayed determining the constitutionality of State apportionment so the legislature could act. *Lein* v. *Sathre*, 205 F. Supp. 536, 540 (D. N.D.); *Magraw* v. *Donovan*, 163 F. Supp. 184, 187–188 (D. Minn.); *Mikell* v. *Rousseau*, 183 A. 2d 817, 823 (Vt. Sup. Ct.); *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, 714–715; *In re Legislative Reapportionment*, 374 P. 2d 66, 71–72 (Colo. Sup. Ct.); *Butcher* v. *Trimarchi*, 28 D. & C. 2d (Pa.) 537, 542.

[28] The Delaware Constitution provides two procedures for amendment, both of which depend on the legislature. First, the legislature may itself adopt an amendment by passage by two-thirds vote at two consecutive sessions. Art. 16, § 1. Second, the legislature by two-thirds vote may place on the ballot the question whether to hold a constitution convention and, if a majority of the voters so decide, a convention is held. Art. 16, § 2.

percent. The amendment gave some additional representation in the lower house to populous districts in New Castle County but left untouched many of the existing disparities between and within counties (see pp. 24–28 above). The percentage of people living in districts electing a majority of the House of Representatives was raised only from 19 to 28 percent.

In short, the Amendment hardly constituted a serious effort by the legislature to give fair representation in either house to all the people of Delaware. The district court in these circumstances was entitled to decree a reapportionment, as was done in the Alabama case now before the Court. *Sims* v. *Frink,* 208 F. Supp. 431, pending on appeal *sub nom. Reynolds* v. *Sims,* Nos. 23, 27, 41, this Term; accord, *Moss* v. *Burkhart,* U.S. D.C., W.D. Okla., decided July 17, 1963; *Sobel* v. *Adams,* 208 F. Supp. 316, 318 (S.D. Fla.); *Toombs* v. *Fortson,* U.S. D.C., N.D. Ga., decided September 5, 1962. See also *Fortner* v. *Barnett,* No. 59,965, Chancery Court, First Judicial District, Hinds County, Mississippi; *Stevens* v. *Faubus,* 354 S.W. 2d 707, 711 (Ark. Sup. Ct.).

The court below stopped short of specifying an apportionment. While it indicated guidelines for testing the constitutionality of a State legislative apportionment in its opinion, they are not part of the order. The decree merely enjoins holding a new election under the unconstitutional apportionment, while allowing the legislature to reapportion itself. It is true that the legislature will not be able before the 1964 elections to pass a constitutional amendment at two consecutive sessions. But, since the existing con-

stitutional provisions have been held invalid, there is no reason why the new apportionment cannot be enacted by statute. No provision in the State constitution prohibits apportionment by statute where no valid apportionment provision exists in the constitution itself. Furthermore, the statutory apportionment need be only temporary. By passing a valid constitutional amendment now, the legislature elected in 1964 can adopt it by approving it again.

In these circumstances, the district court plainly did not abuse its discretion. The Delaware apportionment violated the Fourteenth Amendment. The court decreed the narrowest remedy possible to correct an unconstitutional provision of a State constitution—an injunction against its continued operation. The court could provide time for a constitutional amendment without permitting the election of still another legislature in violation of the complainants' constitutional rights. The State still retains freedom to shape its own system of apportionment subject to the requirements of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the district court should be affirmed.

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DECEMBER 1963.

APPENDIX

1. In a brief filed as *amici curiae* in the four State apportionment cases argued earlier this Term, fourteen State Attorneys General dispute (pp. 19–32) the government's historical analysis of the Constitutional Convention of 1787 as supporting the constitutional requirement that State legislatures be apportioned on the basis of population. First, they say (Br. 20–24, 26) that the framers repeatedly analogized apportionment of the State legislatures and the apportionment of the legislature in the new "national" government; that the apportionment of the State legislatures was frequently not based on population, such as New Jersey which gave each county a member of the State Senate; and that therefore similar apportionments today may properly be analogized to the United States Senate. It is true that the framers did refer to the apportionment of the State legislatures. But, with only one exception, they did not approve apportionments which gave some voters more representation than others. The *amici's* own examples (Br. 22) prove this point.

Madison's statement that "there was the same reason for different numbers of representatives from different States, as from Counties of different extents within particular States" is part of a speech opposing equal representation from every State in the new legislature. Madison argued that the new nation would no longer be "a federal one among sovereign States" but a "national Governt." I *Records of the*

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Federal Convention (Farrand ed., 1911), p. 37. The entire speech, insofar as is relevant is:[1]

> [W]hatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign States, it must cease when a national Govermt. should be put into the place. In the former case, the acts of Congs. depended so much for their efficacy on the cooperation of the States, that these had a weight both within & without Congress, nearly in proportion to their extent and importance. In the latter case, as the acts of the Genl. Govt. would take effect without the intervention of the State legislatures, a vote from a small State wd. have the same efficacy & importance as a vote from a large one, and there was the same reason for different numbers of representatives from different States, as from Counties of different extents within particular States.

Madison refers to State apportionment among counties to support his position because they likewise are not entitled to equal representation, regardless of population, in the legislature. The convention, as Madison himself recognized in the *Federalist Papers*, rejected his view that the new constitution would form a national government and end State sovereignty in favor of adopting a mixed national government. Appendix B to the government's brief in the Maryland case [hereinafter Appendix B], pp. 69, 71–72, 77–78. Consequently, Madison's analogy between the new legislature and the State legislatures does not apply to the constitution as it actually exists.

The second statement of Madison relied on by the *amici* (p. 22) is that "[t]he counties in Virginia are

[1] This speech, which strongly supports the government's position, was unfortunately omitted from the Appendix to our brief in the Maryland case.

exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises." This quotation, which comes from the notes of Robert Yates, a convention delegate, is, as we pointed out in Appendix B, p. 24, note 10, almost certainly erroneous. Appendix B contains at least twelve statements by Madison (pp. 4, 15–16, 22–24, 27, 33, 38–39, 45, 48, 53, 60–61, 70–71, 117–118) made at the convention and elsewhere strongly supporting representation both in the federal and State governments based directly on population and attacking other methods of apportionment as unjust. Moreover, Madison's own account of his speech (Appendix B, pp. 22–24) contains no such statement. On the contrary, he says that "Counties of the same States [are] represented in proportion to their numbers" and argues that, since the new government will be supreme, just as the States have been, the legislature must be apportioned on the basis of population as a matter of justice. Thus, again, Madison's speech supports our position that the framers believed that a legislature in a government operating directly on the people must be apportioned on the basis of population and that therefore this was the only fair method of apportioning State legislatures. While, as the *amici* suggest (Br. 21), Madison may have been factually wrong in assuming that the State legislatures of his time were all apportioned on the basis of population whereas several were not, his view of the only fair method of apportionment is plain.

The *amici* then quote Gunning Bedford of Delaware that "[a]n exact proportion in the Representation is not preserved in any one of the States." Appendix B, p. 36. Aside from the fact that *perfect* apportionment based on population is a virtual impossibility for which no one contends, Bedford's basic

argument is that equal representation in the new legislature is required because there is to be "a mere confederacy of the States," not "a perfect consolidation." *Ibid.* He refers to the State legislatures, like the malapportionment of Great Britain, merely to show that all legislatures need not be apportioned by population. He does not praise the unequal apportionment of State legislatures, and implies that, if the new government were to be a consolidation ending the sovereignty of the States, he would not support equal representation for the States.

The *amici* quote (p. 22) a speech by Elbridge Gerry stating that in the State legislatures one branch is often "somewhat aristocratic" which he said would assure "a better chance" of refinement in the choice of representatives. 1 Farrand 155.[2] This statement was, however, made in support of election by the State legislatures, rather than the people. It has nothing to do with apportionment since apportionment can be made on the basis of population whatever method of election is used. This is made clear by the fact that Gerry stated at the convention that allowing each State in the Confederation an equal voice was an "injustice." Appendix B, pp. 29–30. He agreed to equal representation in the Senate only because a compromise was made to form less than "a proper national plan." Appendix B, p. 44.

The statement by Hugh Williamson referred to by the *amici* is part of a speech supporting apportionment based on population. He (Appendix B, p. 7):

> illustrated the cases by a comparison of the different States, to Counties of different sizes within the same States; observing that proportional representation was admitted to be just in

[2] This quotation was not included in Appendix B since, for the reasons stated above, it is irrelevant.

> the latter case, and could not therefore be fairly contested in the former.

This statement can hardly be used to support an apportionment giving each county equal representation regardless of population.

The reference by Randolph cited by the *amici* (I Farrand 26–27) is to various State legislatures which have been feeble and inadequate because they were too democratic. But while he obviously did not want the people directly to control all organs of the government, he did not even suggest that apportionment should be based other than on population. Moreover, Randolph was one of the most vigorous supporters at the convention of apportionment based directly on population. See Appendix B, pp. 51–52.

The *amici* cite (Br. 26) a statement by Hamilton that "individuals forming political Societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States." Appendix B, p. 28. This was merely a statement of the fact that many persons were not entitled to vote. It was certainly not a defense of apportionment on some basis other than population since Hamilton went on in the speech to attack proposals to give each State the same representation. And earlier in the convention, Hamilton had stated that equal representation for each State "shocks too much the ideas of Justice, and every human feeling * * *." Appendix B, p. 14.

The *amici* omit other references to the apportionment of State legislatures. Madison argued for the adoption of what is now Article I, Section 4, giving Congress power to regulate federal elections because unfair apportionment of State legislatures might lead to similar results in Congressional districting. Appendix B, pp. 63–64. He repeated this contention at

the Virginia ratifying convention in attacking the injustice of South Carolina's discriminatory apportionment. Appendix B, p. 98. At the Massachusetts ratifying convention, Francis Dana and Rufus King defended Article I, Section 4, in part by pointing to the unfair apportionments of South Carolina, Rhode Island, Connecticut, and Great Britain. Appendix B, pp. 93–94. At the same convention, John Coffin Jones and James Bowdoin praised the State legislatures as generally apportioned by population. Appendix B, p. 94.

We, and apparently the *amici*, have found but one statement at the convention supporting their position.[3] Nathaniel Gorham of Massachusetts, in support of the compromise according each State equal representation in the Senate, stated (Appendix B, pp. 17–18):

> If Va. should have 16 votes & Delre. with several other States together 16. those from Virga. would be more likely to unite than the others, and would therefore have an undue influence. This remark was applicable not only to States, but to Counties or other districts of the same State. Accordingly the Constitution of Massts. had provided that the representatives of the larger districts should not be in an exact ratio to their numbers. And experience he thought had shewn the provision to be expedient.

[3] Gouverneur Morris of Pennsylvania approved of efforts in his own State to prevent backwoodsmen from having their fair representation in the legislature because he thought that they might attain control. Appendix B, p. 53. This was part of Morris' argument that the presentation of new States in the national legislature should be limited so that they never could attain a majority. However, Madison and others vigorously opposed the proposal (Appendix B, p. 53), and the convention rejected it.

Clearly, Gorham was justifying consideration of factors other than population in apportioning State legislatures just as in the new legislature. He does not, however, say that State apportionments can, like the new Senate, give equal representation to each county. For, he referred to the Massachusetts Constitution of 1780 which provided that the Senate would be apportioned among the districts on the basis of taxes paid (a method of apportionment considered at the time as analogous to population) and that the House of Representatives would be apportioned by giving to each town having 450 voters one member and an additional member for every 225 additional voters, except that each existing town was given at least one. Part II, Ch. I, Sec. 2, Art. I, and Sec. 3, Art. II. Thus, the Massachusetts legislature was apportioned largely in proportion to taxes and population.

One statement, made by a delegate having no particularly significant part in the convention, is hardly enough to show that the framers believed that the apportionment of State Senates was analogous to the apportionment of the Senate of the United States. This would be so even if the convention contained no other statements on this subject. But, as shown above and particularly in our brief in the Maryland case (pp. 75–80), the whole history of the Constitution demonstrates the contrary conclusion.

In short, the references to the States legislature apportionments at the Philadelphia convention and the subsequent ratifying convention do not support the proposition that State Senators are analogous to that of the United States. The references cited above show that framers overwhelmingly believed that the only fair method of apportioning State legislatures is according to population. Madison and Williamson argued that the new legislature should like-

wise be apportioned by population because they desired a truly national government ending State sovereignty and operating directly on the people. But this was not the result of the convention. Instead, the new government was to be a mixture of a national government and a confederation, with the House of Representatives reflecting the former and the Senate the latter. Since the States are not such a mixture, their legislatures, as the framers plainly believed, must be apportioned on the basis of population.

2. The *amici* Attorneys General also claim (Br. 27–29) that the federal anology is valid because many of the framers of the constitutional convention proposed limiting the democratic features of the new government. This we do not dispute. Our point is rather that those supporting a national government operating directly on the people strongly supported apportionment of the entire legislature, whether it was to be one or two houses, on the basis of population. This was true even when they opposed election of the legislature by the people in favor of election by the State legislatures.

The framers cited by the *amici* made clear that apportionment of the legislature or a non-population basis was not intended to be one of the permissible checks on control by the people. The *amici* cite (Br. 27–28, 32, 34, 37) Randolph, Gerry, and Madison. Not only do none of these statements even suggest that apportionment on any basis but population is fair, but, as we have seen above (pp. 61–65), all three vigorously supported apportionment based entirely on population.

The *amici* quote (Br. 28–29) a series of statements made by proponents of the plan finally adopted of equal representation of States in the Senate. The quotations state that equal representation was needed

to prevent the populous States from dominating and destroying the less populous. It is significant, however, that these men believed in representation by States rather than people entirely because they considered the new government as either a mere continuation of the old Confederation although with somewhat enhanced powers or as a mixture of a Confederation and a national government.

In the same speech quoted by the *amici* in which William Paterson of New Jersey said he feared that his State "would be swallowed up" (I Farrand 179), he plainly stated (Appendix B, p. 6):

> A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made, then there may be fairly an equality of representation.[4]

Later, he said that apportionment based on population "is right in principle" if "state distinctions are done away; but those to certain purposes still exist." Appendix B, p. 12. On several other occasions, he made plain that equal representation by States was necessary to protect State sovereignty. Appendix B, pp. 6, 11, 12. Thus, it is plain that Paterson believed that the legislature of a government operating directly as the people, such as a State, must be apportioned according to population.

David Brearly of New Jersey agreed with Paterson that equal representation of States was required if the Confederation was to be continued, as he desired,

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[4] Paterson is referring to a proposal of David Brearly of New Jersey that, if the Confederation is to be ended, the States should be abolished, new States should be formed with equal population, and representation in the legislature should be the same for each State (Appendix B, p. 7).

and that representation by population was permissible only if a national government were formed (Appendix B, p. 7):

> If the states still remain sovereign, the form of the present resolve is founded on principles of injustice. He then stated the comparative weight of each state—the number of votes 90. Georgia would be 1, Virginia 16, and so of the rest. This vote must defeat itself, or end in despotism. If we must have a national government, what is the remedy? Lay the map of the confederation on the table, and extinguish the present boundary lines of the respective state jurisdictions, and make a new division so that each state is equal—then a government on the present system will be just.

The next delegate cited by the *amici* (Br. 29), Roger Sherman of Connecticut, first proposed the compromise that the Senate be equally apportioned among the States and the House of Representatives be apportioned by population. He explained the former as an effort to protect State sovereignty (Appendix B, p. 9):

> * * * as the people ought to have the election of one of the branches of the legislature, the legislature of each state ought to have the election of the second branch, in order to preserve the state sovereignty; and that each state ought in this branch to have one vote.

The speech in which Alexander Martin of North Carolina states that he feared domination by the populous States begins by suggesting that the new government must be a continuation of the Confederation (Appendix B, p. 16):

> [The States] entered into the confederation on the footing of equality; that they met now to to [sic] amend it on the same footing, and that he could never accede to a plan that would

> introduce an inequality and lay 10 States at the mercy of Va. Massts. and Penna.

Gunning Bedford, as we have seen (pp. 63–64), based his argument for equal representation of States on his view that the "confederacy of the States," in which each State is sovereign, must be continued.

Oliver Ellsworth of Connecticut supported the Connecticut compromise. He based this position explicitly on the ground that the new government must be a mixture (Appendix B, pp. 30–31):

> We were partly national; partly federal. The proportional representation in the first branch was conformable to the national principle & would secure the large States agst. the small. An equality of voices was conformable to the federal principle and was necessary to secure the Small States agst. the large. * * * The existing confederation was founded on the equality of the States in the article of suffrage: was it meant to pay no regard to this antecedent plighted faith.

Ellsworth later repeated essentially the same remarks. Appendix B, pp. 32–33.

Numerous other framers made similar statements at the Philadelphia convention and the State ratifying conventions. See the government's brief in the Maryland case, pp. 75–79. The *amici* can cite only one statement in response—that by Nathaniel Gorham to which we referred earlier (pp. 66–67). This statement, in the face of overwhelming contrary evidence, cannot be taken as the sense of the convention. In short, the fact that many of the framers wanted to limit the democracy contained in the new constitution is irrelevant. The fact is that the basis of apportionment was no part of this effort. Those who wanted to give the States equal representation in the whole legislature or one house did so because they believed

the new government must continue the sovereignty of the States.

3. The *amici* Attorneys General contend (Br. 30) that the States, at the time of the convention were not truly sovereign. They cite only one statement at the convention in support of this argument. Rufus King of Massachusetts said that "[t]he States were not 'sovereigns' in the sense contended for by some" and specified various limitations on their sovereignty. I Farrand 323. However, he went on to admit that the States were in some respect sovereign (*id.* at 324):

> If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects—they formed a Nation in others.

Moreover, King was a vigorous proponent of representation based on population for the whole legislature. See Appendix B, p. 35. Indeed, he was willing to continue the fight even after Madison agreed to the compromise. Appendix B, pp. 58–59. King therefore desired to minimize State sovereignty. But his view was rejected as to one house of the legislature by those who believed that substantial State sovereignty existed and should be continued.

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